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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 203

P. F. PETERSEN BAKING COMPANY, SCHULZE BAKING COMPANY, CONTINENTAL BAKING COMPANY, ET AL., APPELLANTS,

vs.

CHARLES W. BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA, AND DWIGHT F. FELTON, AS DEPUTY SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF NEBRASKA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION FOR JURISDICTION.

As set forth in appellants' jurisdictional statement under Rule 12, appellants are appealing under Section

237 (*a*) of the Judicial Code as amended (28 U. S. C. A. 344 (*a*)). The judgment is the final judgment of the Supreme Court of Nebraska, which is the highest court in the State of Nebraska. Appellants' suit draws in question the validity of a statute of the State of Nebraska on the ground of its being repugnant to the Constitution of the United States, and the decision of the Supreme Court of Nebraska was in favor of the validity of the statute. Under the above provision of the Judicial Code as amended by the Act of February 13, 1925, and subsequent acts (28 U. S. C. A. 861, 861 (*a*) and 861 (*b*)), appeal is proper and this case is appealable.

In this case appellants challenge as unconstitutional as violating the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of these United States an Act of the 1931 Legislature of the State of Nebraska entitled House Roll 51, which appears as Chapter 162 of the Laws of Nebraska, 1931, and Special Session 1931, and is commonly known as the "Nebraska Standard Bread Loaf Law" in that said statute;

(1) Makes an excess tolerance obligatory, which tolerance has been declared unconstitutional in the case of *Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 504; *Holsum Baking Co.* v. *Greene*, 45 Fed. (2d) 238; *State* v. *Curran*, 200 Ala. 4, 6, 124 S. 909, 912; *State* v. *Curran*, 23 Ala. App. 275, 124 S. 911; *Quaker Baking Co.* v. *Herring*, 3 Fed. Supp. 118; *Wonder Bakeries Co., Inc.*, v. *White et al.*, — Fed. Supp. —;

(2) Vests powers in the Secretary of Agriculture which are unreasonable and arbitrary;

(3) Exempts from the statute "fancy breads" which term describes no known commodity, by which exemption and the failure to define the crime of manufacturing overweight bread the statute has not the definiteness and certainty required of criminal statutes creating a new offense;

(4) Prohibits the manufacture of a 20-ounce loaf of bread, an unreasonable restriction on appellants right to do business.

In addition to challenging the statute itself, as enacted by the Legislature of the State of Nebraska, appellants challenge the rules and regulations issued by the Deputy Secretary of Agriculture under and pursuant to the authorization of the statute on the ground that rules and regulations issued pursuant to legislative authority are in essence legislative acts of the State. That such rules express the legislative will and have no force otherwise; and as respects their validity under the Constitution of the United States, are on the same plane in that they contravene the restraints which the Constitution places on the legislative power of the State, and are invalid. As authority for this attack on these rules and regulations of the Deputy Secretary of Agriculture being legislative acts or statutes of any State, as provided in Section 237 (*a*) aforesaid, appellants in their statement as to jurisdiction refer the court to the cases of *J. P. King Mfg. Co.* v. *City Council of Augusta*, 277 U. S. 100, 48

S. Ct. Rep. 489; *Sultan Railway & Timber Co.* v. *Department of Labor and Industries,* 277 U. S. 135, 48 S. Ct. Rep. 505.

Among the rules attacked being:

(1) The maximum tolerance provided in the different rules issued by the Deputy Secretary of Agriculture;

(2) The time, place, condition, possession and particular loaves of bread required to comply with the statute as an arbitrary restriction on appellants right to do business.

(3) The tolerances and requiring the maintenance of a loaf of bread within these tolerances for an unreasonable length of time, impossible of performance, and as an unreasonable restriction on appellants' right to do business.

WHEREFORE appellants respectfully submit that this Court has jurisdiction as set forth in their jurisdictional statement heretofore filed herein.

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Counsel for Appellants.